No. 505. 189

Brf. of Burton for P. C. [illegible]

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

JOHN P. MALLETT AND CHARLES B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

Brief of R. O. BURTON, for Plaintiffs in Error, on Motion to Dismiss or Affirm.

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Brief of R. O. BURTON, for Plaintiffs in Error, on Motion to Dismiss or Affirm.

The facts are not fully stated in the motion by defendant in error. In one particular they are not correctly stated. The plaintiffs in error were tried at September Term, 1898, of the Eastern District Criminal Court for Edgecombe County; were convicted and sentenced to two years imprisonment in jail. At said term they appealed to the Superior Court. The record was certified up by the Clerk of the Criminal Court, on April 1, 1899. Hence the error.

At the time of the alleged commission of the offense charged, and at the time of the trial, the following was the statute law of North Carolina on the subject of appeals by the State:

"An appeal to the Supreme Court may be taken by the

State in the following cases, *and no other*. Where judgment has been given for the defendant:

"(1) Upon a special verdict.

"(2) Upon a demurrer.

"(3) Upon a motion to quash.

"(4) Upon arrest of judgment."

The Code, sec. 1237.

On March 6, 1899, the General Assembly passed an act relating to said Criminal Court (Laws 1899, chap. 471), by which the State was given the right of appeal to the Supreme Court in all cases from the decision of the Superior Court on the appeal from the Criminal Court.

On March 3, 1899, the General Assembly passed an act relating to the Western District Criminal Court (Laws 1899, chap. 371); and by said act no appeal is allowed to the State in such cases—the old law, Code sec. 1237, remaining in force.

The counties composing the Eastern District are Mecklenburg, New Hanover, Edgecombe, Halifax, Northampton, Robeson, Cumberland, Craven, Nash, Warren and Wilson—11 in number.

The counties composing the Western District are Buncombe, Madison, Haywood, Burke, Surrey, Yancey, McDowell, Henderson, Forsyth and Caldwell—10 in number.

There are 97 counties in the State. In all of these except in the Eastern District, the State can only appeal in the four cases enumerated in The Code.

As a matter of history we know that the Eastern District lies mainly in what is known as the negro belt of the State; while the Western District lies in the extreme western part of the State, where the population is mainly white.

The Superior Court granted to the plaintiffs in error a new trial, without passing on all their exceptions. On appeal the Supreme Court reversed this ruling and affirmed

the judgment of the Criminal Court. Thereupon, at the same time, and before the decision was certified down, the defendants (plaintiffs in error) filed a petition or motion, asking a rehearing; and if that could not be had (as it could not be under the practice in North Carolina), then for a reargument, to the end that the Court might pass on the points not passed on by the Superior Court, and which they had a right to have heard.

The Court, without allowing any rehearing or reargument whatever, proceeded to pass on certain points omitted in the first opinion.

In their petition for reargument the plaintiffs in error set forth among other things the following:

"3. That prior to the beginning of this action an attachment against the property of the defendants was issued at the instance of J. M. Baker, administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in the case. By virtue of said attachment the Sheriff of Edgecombe County seized the ledger and counter book of the defendants and have kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defendants were offered in evidence. The defendants objected. The objection was overruled, and the defendants excepted. (See record, pp. 44 and 45.) In this the defendants submit that there was error. For it is in effect making the defendants give evidence against themselves under the principles laid down in the case of *Boyd* v. *United States*, 116 U. S., 616. At the argument of this case at this term counsel had not found this authority and his argument did not go upon this ground. Since said hearing he found the said case and they are advised that the principle and the authority are decisive and would at once satisfy the Court of the defendants' right to a new trial if the matter could be properly brought to its attention.

"4. That at the time of the commission of the alleged offence no appeal was allowed to the State from any ruling of the Judge of the Superior Court which granted a new trial to a defendant convicted in the Criminal Court. If the Statute of 1899, sec. 6 of chap. 471, grants such appeal the defendants submit that it is *ex post facto* and void as to them. (*Kring* v. *Missouri*, 107 U. S., 221.)

"5. That if such statute has the effect aforesaid it denies to the defendants the equal protection of the laws and is void under the Fourteenth Amendment to the Constitution of the United States, because the defendants in criminal actions tried in the Western Criminal District are exempt from this provision. In that district there is no such right of appeal by the State. (*State* v. *Davidson*, 124 N. C., 839.)

"6. But the defendants submit that the said statute should be restricted to cases arising after its passage. At the time of the passage of the act the present case had already been tried and appeal taken by the defendants to the Superior Court.

"7. That his Honor Judge Sutton overruled the defendants' preliminary plea to the bill of February Term, 1898, (see pp. 6, 7 and 8 of the record); and they expressly asked him to find the facts on said plea (pp. 58 and 59 of the record), which he refused to do (pp. 59 and 60 of the record). His Honor, among other things, stated as a reason for not doing so, that the prayer or request was made in writing after three of the counsel had spoken on the merits, and was not therefore in apt time. It is respectfully insisted that his Honor misapprehended the rule. It is true that his Honor had already overruled the plea and the defendants had excepted. But at any time prior to the end of the trial, and perhaps to the end of the court, the defendants had a right to have the facts found with a view to an appeal and his Honor erred in refusing to find said facts, after being requested to do so."

The plaintiffs in error filed the following

ASSIGNMENT OF ERRORS:

1. That the Supreme Court erred in holding that the statute of North Carolina, chap. 471, sec. 6, of the Public Laws of 1899, whereby, after the defendants were adjudged by the Superior Court of Edgecombe County to be entitled to a new trial as matter of law, the State of North Carolina was allowed to appeal to the Supreme Court, is not *ex post facto* as to the offence charged, and therefore void under Art. I, sec. 10 of the Constitution of the United States.

2. That it appears by the record that the defendants (plaintiffs in error) were tried at September Term, 1898, of the Circuit Criminal Court of Edgecombe County, and convicted. That divers exceptions were taking to the rulings of the Court, and from the judgment the defendants (plaintiffs in error) appealed to the Superior Court of Edgecombe County. At June Term, 1899, of said Superior Court, the Court passed on two of the exceptions and awarded the said plaintiffs in error a new trial. From this judgment the State of North Carolina appealed to the Supreme Court, which reversed the ruling of the Superior Court. That at the time of the alleged commission of the offence charged and of the appeal taken by the plaintiffs in error in September, 1898, and until the passage of the Act of 1899, chap. 471, sec. 6, Public Laws of North Carolina (to-wit, March 6, 1899), there was no statute allowing an appeal for the State from the judgment of the Superior Court in favor of the defendant.

Wherefore, the plaintiffs in error insist that said Act of 1899, chap. 471, is *ex post facto* as to them, in violation of Art. I, sec. 10 of the Constitution of the United States, and void; and that in the opinion and judgment of the Supreme Court, holding to the contrary, there is manifest error.

3. That there are two District Criminal Courts in the State of North Carolina—the Eastern District Criminal Court, which embraces Edgecombe County, wherein plaintiffs in error reside and were tried; and the Western District Criminal Court (chap. 371, Public Laws of 1899). That in said Western District no appeal is allowed to the State from the order or judgment of the Superior Court granting to a defendant a new trial. (*State* v. *Davidson*, 124 N. C., 839.)

Wherefore, these plaintiffs in error insist that they are denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

4. That the Court holds that the defendants were not made to be a witness against themselves under the following facts, which appear on the record: That an attachment was issued against the property of the defendants, under which the sheriff seized the ledger and the counter book of the defendants. On the trial of this action said books were brought into court, and introduced as evidence against the defendants, over their objection.

The plaintiffs, under rule 21 (*School District* v. *Hall*, 106 U. S., 428), file the following:

Additional Assignment of Errors.

The plaintiffs in error, in addition to the assignment of errors herein, now assign the following errors in the opinion and decision of the Supreme Court of North Carolina:

5. That the defendants (plaintiffs in error) being partners, were indicted for conspiring with their clerk to cheat and defraud certain creditors; and among the circumstances relied on was the shipment of certain goods to several points, "To order notify," which goods were marked in the names of fictitious persons. The shipment

of the goods was shown by a small book of the firm of Mallett & Mehegan, called the counter-book, or day-book. Said book was seized by the sheriff of Edgecombe County in certain attachment proceedings instituted by the prosecutor herein, under an order to attach the goods and property of plaintiffs in error. That the said prosecutor testified that he had the information from the small day-book aforesaid, as to the said shipment; and that the said day-book was put in evidence against the objection of the plaintiffs in error. The Supreme Court of North Carolina held that the plaintiffs in error were not thereby made to be witnesses against themselves.

Wherefore, these plaintiffs in error insist that they were thereby made to be witnesses against themselves, and that thus their privileges and immunities as citizens of the United States have been abridged, and they were deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

6. That in the said action one of the circumstances relied upon to convict the defendants (plaintiffs in error) was a certain account between the firm of Mrs. John P. Mallett and the said firm of Mallett & Mehegan, and certain erasures and changes had been made thereon; which account, showing the payment to her of a debt of $873, appear on the ledger of said firm. Said book was seized by the sheriff in the attachment proceedings aforesaid, and was produced upon the trial of this indictment and put in evidence against the defendants therein (plaintiffs in error) over their objection. The Supreme Court of North Carolina held that the plaintiffs in error were not thereby compelled to be witnesses against themselves. The plaintiffs in error submit that this ruling is erroneous.

Wherefore, the plaintiffs in error insist that they were thereby made to be witnesses against themselves, and that

thus their privileges and immunities as citizens of the United States have been abridged, and they are deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

7. The plaintiffs in error submit that by this seizure of said books and their admission into evidence, they have been deprived of the privileges and immunities guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, which extends to all citizens of the United States the privileges and immunities enumerated in the Fourth and Fifth Amendments to the Constitution of the United States.

8. That the plaintiffs in error were examined in supplementary proceedings, instituted by the prosecutor, under The Code of North Carolina, secs. 488 *et seq.*, and compelled to answer. By the said statute it is provided that "No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution." The defendants (plaintiffs in error) were fully examined in said supplementary proceedings as to the shipment of said goods, and as to the contents of said books, and among other things as to the account of Mrs. John P. Mallett aforesaid, and upon certain erasures or changes therein. Afterwards questions arose as to the amount of the personal-property exemptions of the plaintiffs in error, and the matter was referred to S. S. Nash, Esq., as referee. At the hearing thereof the plaintiffs in error offered themselves as witnesses, but not as witnesses as to any matter or thing inquired of in said supplementary proceedings; but on cross-examination by the attorneys for the prosecutor herein and against the objection

of the plaintiffs in error, they were compelled to go into the same matters as were gone into in their examination in supplementary proceedings, and the evidence thereon was substantially the same. When the present indictment was tried, the defendants (plaintiffs in error) objected to the use of the evidence elicited in the supplementary proceedings, and as well to the evidence before Nash, Referee. The trial Judge professed to rule out all the evidence in supplementary proceedings, but admitted the evidence before Nash, Referee, which was but a repetition of that already elicited in supplementary proceedings. On appeal to the Superior Court, the judge held that the evidence in supplementary proceedings had been used against the defendants (plaintiffs in error) and awarded the defendants a new trial. On appeal by the State to the Supreme Court, the Court reversed the ruling of the Superior Court and held that the evidence before Nash, Referee, was competent.

Wherefore, the plaintiffs in error submit that they have been made to be witnesses against themselves, and have thereby been deprived of their liberty without due process of law, and that their privileges and immunities as citizens of the United States have been abridged, contrary to the Fourteenth Amendment to the Constitution of the United States.

9. That the defendants moved to quash the indictment, because the evidence taken in said supplementary proceedings was used before the grand jury in procuring a bill. Both the evidence in supplementary proceedings and the evidence before Nash, Referee, was carried by the witnesses before the grand jury. There was no one present to raise objection against its use. The judge stated that it was not allowable for the State to introduce any evidence or any statement made by either of the defendants on examination in the supplementary proceedings, nor was it admissible for any witness of the State to testify to

any fact, knowledge of which was acquired by them through disclosures made on said examination; but said remark was made before the petit jury. Nevertheless, his Honor overruled the motion, but declined to find any facts as set out in the petition for reargument in the Supreme Court. The opinion of the Supreme Court states that this was the identical point raised as to the admission of the evidence in the supplementary proceedings at the trial, and that the Judge had all through the trial rejected all evidence that transpired in the supplementary proceedings; but the proceedings before the grand jury were not before the Judge, and the evidence clearly shows that such evidence was admitted.

Wherefore, these plaintiffs in error submit that they have been made to be witnesses against themselves, and have thereby been deprived of their liberty without due process of law, and their privileges and immunities as citizens of the United States have been abridged, contrary to the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

Point One.

The counsel for defendant in error contends that the record does not disclose the fact that any Federal question was raised in the trial of the case in either of the courts in which the case was heard, and that no such question was raised.

1. As to the first, second and third assignments of error, it is patent that the points could not have been raised at the trial in the Criminal Court (September, 1898), because the statutes complained of had not been enacted. Further, the State never asserted any right to appeal or had any occasion to do so until the judgment of the Superior Court.

When the State undertook to appeal from the decision of the Superior Court, it stated, "The State excepts and takes an appeal." When the case on appeal was served on counsel of defendants, which was after the adjournment of the court, they filed exceptions thereto, and among other things said: "The defendants insist that the State has no right to an appeal in this case, and therefore the record should not be sent to the Supreme Court." This necessarily referred to the constitutional grounds, because the statute gave the appeal. But there was no Court then to pass on the point. In the Supreme Court, the original and only brief of Mr. Fountain for defendants, in discussing the right of appeal, says: "But if chapter 471, Acts of 1899, should apply in term to this case, defendants insist it is contrary both to the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States."

So, in the use of the evidence in supplemental proceedings, the brief says, among other things, "The gist of this offense would seem to be the shipment of goods to fictitious persons, and the payment to Mrs. J. P. Mallett of $873 for board, as she claimed. Now the ledger containing Mrs. Mallett's account, and the counter-book with shipment of goods to order notify, were taken from defendants by the sheriff, and they were fully examined into in supplemental proceedings, and defendants examined upon them. * * * On page 18 it appears that this book (counter-book) was first heard of in examination in supplemental proceedings, in which evidence it fully appears that the shipment was made to order notify or fictitious persons. * * * Appellees insist that this evidence was incompetent, and Judge Hoke's ruling should be sustained. Code, sec. 488, provides: 'No person shall refuse to answer,' etc., 'and answers not used against him,' etc. What does this mean? Certainly not that the party shall

be required to furnish facts from which his enemy may forge a chain to catch him in the meshes of the criminal law. It is provided by the Constitution of the United States, Art. V, Amendments, and Constitution of North Carolina, Art. I, sec. 11: 'No person shall be compelled to be a witness against himself in a criminal case.' Now, sec. 488, sub-sec. 5, of The Code, must protect the witness as fully as he is protected under the Constitution and the common law, otherwise it would be unconstitutional. But our Court holds this act constitutional, and in the same decision decides that it protects as fully as the Constitution, for, says Smith, C. J., in *LaFontaine* v. *Underwriters*, 83 N. C., 142: 'We are clearly of opinion that he is protected from the consequences of the discovery and the facts eliminated can be given in evidence against him in no criminal prosecution to which they are pertinent.' Note the facts eliminated can not be given in evidence. This must be so, for if the plaintiffs should compel defendants upon supplemental proceedings to disclose certain facts, and then upon indictment offer to prove those facts, alleging that he could prove them by other witnesses, not using the evidence taken and be allowed to do so; this law would be a delusion and a snare to the defendant, and entirely abrogate the Constitution in this respect. But on page 143 of the same case the Court says: 'The answers of the witness can not be used against him in any criminal proceeding whatever, and his constitutional rights, etc., are maintained intact and in full.' So there can be no doubt the defendants' constitutional rights are fully preserved. What are they? They are fully discussed in *Councilman* v. *Hitchcock*, 142 U. S., 547, 35 L. Ed., 1110, bottom page; *United States* v. *James*, 26 L. R. A., 419."

When the petition for reargument was presented, the defendants explicitly and in detail raised the points set forth in the first four assignments of error. This petition

is not to be taken as a petition for rehearing—the Court declined to allow it to be so treated, and refused to reexamine the questions already passed on; but it did, while the case was *in fieri*, and before the opinion was certified down, look into and pass upon certain of the omitted questions. So that it stands as an original hearing; and none of the cases cited in the brief of the State's counsel have any application. In *Miller* v. *Railroad Co.*, 168 U. S., page 131, the point was set up a year after judgment; and in *Duncan* v. *Missouri*, 152 U. S., page 377, the point was raised after the rehearing.

Dewey v. *Des Moines*, 173 U. S., 193, does not in any wise sustain their contention.

"The Court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. * * *

"Nor does the record herein show by clear and necessary intendment that the Federal question must have been directly involved, so that the State Court could not have given judgment without deciding it. In such case it has been held that the Federal question sufficiently appears.

"Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, *there must be something in the case before the State Court which, at least, would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the Court, while not noticing the question, was such that the judgment, by its necessary effect is a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law.*" (Pp. 198, 199.)

"No particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the State Court in such a manner as to bring it to the attention of that Court."

Green Bay, etc., Co. v. Patten Paper Co., 172 U. S., 58, 67.

"'If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the State Court could not have given judgment without deciding it, that will be sufficient;'" citing *Powell* v. *Brunswick Co.*, 150 U. S., 433, 440.

It would be difficult to call to a Court's attention the Federal question more strongly than was done by the petition, which relied upon "the principles laid down" in Boyd's case. "For it is in effect making the defendants give evidence against themselves under the principles laid down in *Boyd* v. *United States*, 116 U. S., 616. At the argument of this case at this term counsel had not found this authority, and his argument did not go upon this ground. Since said hearing he found the case, and they are advised that the principle and the authority are decisive." What principle? The principles enunciated in that case—the right of the citizen to be secure in the enjoyment of his fundamental Federal rights as enumerated in the Fifth Amendment, and now secured to all citizens of the United States under the beneficent provisions of the Fourteenth Amendment. Analize it for a moment: A defendant asks the State Court to protect him from the abridgement of his fundamental rights—that he be not made to be a witness against himself; and he refers, for support of his position and the definition of his rights, to the most thorough discussion of those rights as based upon

the Federal Constitution, to be found in the books. Yet it is urged that this is a claim to protection under the State Constitution, which has the same language. It is a claim to the *principles enunciated in Boyd's case*, which are Federal. It is surely sticking in the bark to confine his claim to the State law. The refusal of the right, of itself, necessarily involves the Federal question. The right of protection against self-accusation, which I contend is guaranteed under the Federal Constitution, is necessarily denied by a decision which compels the defendant to be a witness against himself. The matter then was called to the attention of the State Court, and it denied the protection. The guaranty of the Federal Constitution was at once set at naught.

It seems to me that, at any rate, the Court clearly having jurisdiction, should see to it that the rights of a party to the protection of the Federal Constitution, brought to the attention of the State Court, should not be ignored on any question of verbiage or insufficient statement. (Mr. Justice Field, 144 U. S., page 359.)

Point Two.

The statute giving the right of appeal to the State is ex post facto as to this case, and void under Art. I, sec. 10, of the Constitution.

In *Kring* v. *Missouri*, 107 U. S., 221, it was held that any law is an *ex post facto* law, within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage.

To the same effect is *United States* v. *Hall*, 2 Wash. (C. C.), 366.

"In *State* v. *Keith*, 63 N. C., 140, the Supreme Court

of that State held that a law repealing a statute of general amnesty for offenses arising out of the rebellion was *ex post facto* and void, though both statutes were passed after the acts were committed with which defendant was charged."

This case is thus cited in Kring's case as authority; and its principles seem to be approved, as well, in the dissenting opinion.

In *Thompson* v. *Utah*, 170 U. S., 343, 351, 352, it is said: "It is not necessary to review the numerous cases in which the Courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which, by its necessary operation and 'in relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.' * * * Of course a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. * * * 'The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it can not lawfully, we think, in doing so, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.'" Citing Cooley Cons. Lim.

That the right in the present case is a substantial one is apparent, when we consider that if the old law is in force, the plaintiffs in error get a new trial; if the new applies, they stand convicted of a felony, with consequent disfranchisement, and must spend two years in jail.

Merely calling the new statute a change in the law of procedure does not alter the rule.

It is said in *Kring* v. *Missouri:* "But it can not be sustained without destroying the value of the constitutional

provision: that no law, however it may invade or modify the rights of a party charged with crime, is an *ex post facto* law within the constitutional provision, if it comes within either of these comprehensive branches of the law designated as pleading, practice and evidence.

"Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed by State legislation after the offense committed, to the disadvantage of the prisoner, and not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

"And *can any substantial right* which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it can not."

POINT THREE.

The change of the statute law, whereby an appeal by the State is allowed in the Eastern District, but denied in all other portions of the State, is a denial of the equal protection of the laws, which is forbidden by the Fourteenth Amendment.

It is true that the Court has said that the States have a certain power of classification, and "that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection." But such classification can not be made arbitrarily. The classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Gulf, etc., Railway Co. v. Ellis, 165 U. S., 150, 155.

Mr. Justice Brewer, in delivering the opinion of the Court, on page 156, quotes the language of Judge Baxter

in *Dibrell* v. *Morris's heirs*, 15 S. W. Rep., 87, 95: "We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary."

In *Janesville* v. *Carpenter*, 77 Wis., 288, a statute authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature, was likewise held to be void, as discriminating and class legislation, in violation of the spirit of the Constitution, and contrary to public justice.

165 U. S., 164.

In *Hayes* v. *Missouri*, 120 U. S., 68, 72, there was a substantial reason for allowing the State 15 peremptory challenges in cities of 100,000 inhabitants, while elsewhere the number was fixed at 8. It "is simply providing against the difficulty of securing, in such cases, an impartial jury in cities of that size, which does not exist in other portions of the State."

Thus it will be seen that there must be some reason for these discriminations—some foundation principle of common sense on which the distinction rests. I can see none in the present case. It will hardly be contended by the State that the harsher rule was intentionally applied to the counties in the negro belt, for that would be at once the doom of the statute. Nor can we be allowed to conjecture that the draftsman of the act had this case in view, in which the appeal from the Criminal Court was already pending. There can be no sensible reason suggested for the discrimination; and we say, therefore, it is illegal.

We contend that the procedure, being a matter of gen-

eral law, must be regulated by the same law throughout the State.

Silberman v. Hey (Ohio), 44 L. R. A., 264.

Mr. Webster's definition in the *Dartmouth College Case*, 4 Wheat., 519, so often quoted, is: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

See Bank v. Cooper (2 Yerger, 599); 24 Am. Dec., 518, and 543, 544.

Budd v. State, 3 Humph., 490.

Hill v. Town of Sunderland, 3 Vt., 507.

"What is 'the law of the land'? This Court, on two occasions, and upon the most mature consideration, has declared the clause, 'law of the land,' means a general public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances. * * * The Act of 1827 is peculiarly partial. It is limited in its operation to a comparatively small section of the State, and to a very few individuals claiming a very small portion of the section of country referred to."

Wally's Heirs v. Kennedy, 2 Yerger, 554 (24 Am. Dec., 511).

A law is not general because it operates upon all within a class unless there is a substantial reason why it is made to operate upon that class only and not generally upon all.

Ex parte Jentzsch, 32 L. R. A. (Cal.), 664.

See also, Sutton v. State, 33 L. R. A. (Tenn.), 589.

Point Four.

The plaintiffs in error have been made to be witnesses against themselves, and thus their privileges and immunities as citizens of the United States have been abridged, in violation of the Fourteenth Amendment to the Constitution of the United States.

1. It is perfectly clear from the great decision in *Boyd* v. *United States*, 116 U. S., 616, that the Supreme Court of North Carolina erred when it decided that seizure of a man's private books under a warrant of attachment and their introduction in evidence against him, is not equivalent to making him a witness against himself. In the Boyd case, on information by the District Attorney, in a cause of seizure and forfeiture of property against 35 cases of plate glass, seized by the collector as forfeited to the United States, the charge was that the goods in question were imported into the United States, subject to the payment of duties: and that the owners or agents, committed a fraud on the revenue in evading payment of duties. The plaintiffs in error entered a claim for the goods. By an order of the Court notice was given to claimant's requiring them to produce their invoice. They did so, but objected to its admission into evidence. By the statute a failure to produce, in response to the motion, would have entitled the Government to have the allegations in the motion taken as confessed. This was held a violation of the Fifth Amendment, in compelling the party to be a witness against himself, and, also, of the Fourth Amendment, as an unreasonable search and seizure of his private papers.

The language of the opinion is strikingly pertinent to this case:

"It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within

the scope of the Fourth Amendment to the Constitution, in all cases in which a service and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure." (P. 622.)

"The Act of 1863 was the first act in this country, and, we might say, within this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property." (Pp. 622, 623.)

"In the case of stolen goods the owner from whom they were stolen is entitled to their possession; * * * and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt. * * * Whereas, by the proceeding now under consideration the Court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property." (P. 624.)

Speaking of some of the grievances against which the efforts of John Wilkes were directed, the Court says:

"Prominent among these was the practice of issuing general warrants by the Secretary of State for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel." (Pp. 625, 626.)

The opinion of the Court then largely quotes from Lord Camden's great discussion in *Entick* v. *Carrington and others*, 19 Howell's State Trials, 1029, which it characterizes as one of the permanent monuments of the British Constitution.

"'Papers are the owner's goods and chattels; they are his dearest property; and are so far from endaring a seizure, that they will hardly bear an inspection; and though

the eye can not, by the laws of England, be guilty of a trespass, yet where the private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer these; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.'" (Pp. 627, 628.)

"'I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has often been tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper search in these to help forward the conviction. * * * It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle.'" (*Ib.*, 629.)

"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it can not abide the

pure atmosphere of political liberty and personal freedom." (Pp. 631, 632.)

"Reverting, then, to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both.

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and the papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." (P. 632.)

"We are further of opinion that a compulsory production of the private books and papers of the owners of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search

and seizure—within the meaning of the Fourth Amendment." (Pp. 634, 635.)

2. Such being the law, the Fourteenth Amendment protects every citizen of the United States against a violation of this fundamental right of protection and freedom.

Mr. Guthrie, in his recent work on the Fourteenth Amendment (pp. 20–26 and 56–65) discusses the history of the adoption of the Amendment, and the purposes of its framers.

I am indebted to his profound and learned discussion. He calls attention to the fact that the question remains to be settled in the light of the history of the Amendment.

"Doubtless the intention of the Congress which framed and of the States which adopted this Amendment of the Constitution must be sought in the words of the Amendment: and the debates in Congress are not admissible *to control* the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves."

United States v. Wong Kim Ark, 169 U. S., 644, 699.

Now it is very manifest that some great purpose underlay the adoption of the peculiar phraseology of the first half of the Fourteenth Amendment. A new sort of citizenship was created—a citizenship under the Constitution and laws of the United States. What rights were intended to be protected under this nomenclature—privileges and immunities of citizens of the United States? The privileges and immunities named in the first eight amendments. If that is not so, the language has almost no meaning—it is mere idle rhetoric.

Judge Cooley in Const. Lim., page 491 (5th ed.), says the precise meaning of the words is not very conclusively settled as yet.

The history of the Amendment throws valuable light upon the meaning of the words. I quote from Mr. Guthrie's book:

"The Fourteenth Amendment was introduced in the United States Senate by Senator Howard, of Michigan, on behalf of the Reconstruction Committee, of which he was a member. This committee consisted of nine members from the House and six from the Senate. They were the real framers of this great constitutional measure. Referring to the provisions of the Constitution as it stood before the adoption of the new amendment and particularly to the Fifth Amendment, Senator Howard said:

'They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress. There is no power given in the Constitution to enforce and carry out any of these guarantees. * * * They stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them, except by their own local Constitutions, which may be altered from year to year. The great object of the first section of this Amendment is, therefore, to restrain the power of the States and to compel them at all times to respect these great fundamental guarantees. * * * The last two clauses of the first section of the Amendment disable a State from depriving not merely a citizen of the United States, but any person, whosoever he may be, of life, liberty or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class

legislation in the States, and does away with the injustice of subjecting one caste of persons to a code not applicable to another. * * * Sec. 1 is a restriction upon the States, and does not, of itself, confer any power upon Congress. * * * I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race, the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. * * * Without this principle of equal justice to all men and equal protection under the shield of the law, there is no Republican government and none that is really worth maintaining.'

"In explaining the provision for the equal protection of the laws, Senator Poland said of equality:

'It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this, we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. * * * It certainly seems desirable that no doubt be left existing as to the power of Congress to enforce principles lying at the very foundation of all Republican government if they be denied or violated by the States, and I can not doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.'

"Thaddeus Stevens, the Republican leader in the House of Representatives, in presenting the proposition for the

Fourteenth Amendment, stated the provisions of the first section, and then said:

'I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are asserted in some form or other in our Declaration or organic laws. But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.'

"Roscoe Conkling was a leading member of the Reconstruction Committee which framed the Amendment. On the argument of the San Mateo County Case in the Supreme Court, December 19, 1882, he produced for the first time the journal of the Committee. This journal has never been published. His argument, which was printed and filed, showed, step by step, how the various provisions came to be inserted, and he affirmed that the Committee intended to give to them the broadest scope and operation, and not in any way to confine their benefit and protection to the colored race. In the course of his argument, Mr. Conkling said:

'At the time the Fourteenth Amendment was ratified, as the records of the two Houses will show, individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York, who came with petitions and appeals seeking acts of Congress to aid them in resisting what they deemed oppressive taxation in two States, and oppressive and ruinous rules of damages applied under State laws. That complaints in respect to property and other rights, made by citizens of Northern

States who took up residences in the South, were rife in and out of Congress none of us can forget; that complaints of oppression, in various forms, of white men in the South—"of Union men"—were heard on every side, I need not remind the Court. The war and its results, the condition of the freedmen, and the manifest duty owed to them, no doubt brought on the occasion for constitutional amendment; but when the occasion came, and men set themselves to the task, the accumulated evils following within the purview of the work were the surrounding circumstances, in the light of which they strove to increase and strengthen the safeguards of the Constitution and the laws.'

"In the same case, Senator Edmunds, who was a member of the Senate when the Fourteenth Amendment was discussed and recommended by that body, speaking of its broad and catholic spirit, said:

'There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered.'"

Guthrie on Fourteenth Amendment, page 22, *et seq.*

Said Mr. Justice Field in his dissenting opinion in *O'Neill* v. *Vermont*, 144 U. S., page 363:

"While, therefore, the ten Amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal Government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon

State power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both State and Federal action. The State can not apply to him, any more than the United States, the torture, the rack or thumbscrew, or any cruel and unusual punishment, or any more than it can deny to him security in his house, papers and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights, as those of citizens of the United States, find their recognition and guaranty against Federal action in the Constitution of the United States, and against State action in the Fourteenth Amendment. The inhibition by that Amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the Constitutions of the several States. The Amendment only gives additional security to the rights of the citizen. It was natural that it should forbid the abridgment by any State of privileges and immunities which the Constitution recognized and guaranteed as rights of citizens of the United States. A similar additional guaranty of private rights is found in other instances. An inhibition is contained in the several State Constitutions against their legislatures passing a bill of attainder or an *ex post facto* law, and yet a like inhibition against State action is embodied in the Constitution of the United States."

In the same case (p. 370) Mr. Justice Harlan, whose dissenting opinion was in the main concurred in by Mr. Justice Brewer, said:

"I fully concur with Mr. Justice Field, that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized

and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people that the absence from the Constitution, adopted by the Convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States. The Constitution was ratified in the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union, Articles of Amendment would be submitted to the people, recognizing those essential rights of life, liberty and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country. Among those rights is immunity from cruel and unusual punishments, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgment by the States. A judgment, therefore, of a State Court, even if rendered pursuant to a statute, inflicting or allowing the infliction of a cruel and unusual punishment, is inconsistent with the supreme law of the land."

The majority of the Court declined to pass on the question as not properly raised by the record.

Hodgson v. Vermont, 168 U. S., 262, 268.

To put the point sharply: Suppose the State put a prisoner on the stand and compelled him to give testimony which convicts him of murder; has not one of the fundamental rights of a citizen of the United States been destroyed? Could not this Court protect the citizen? If so, it has the power in this case.

I desire, also, to call attention to the notable argument

of the late John Randolph Tucker in *Spies* v. *Illinois*, 123 U. S., 131, 143, referred to by Mr. Justice Field in his dissenting opinion in *O'Neill* v. *Vermont*, 144 U. S., 359.

This view of the law applies to all the supplemental assignments of error.

Point Six.

The circumstances set forth in the fourth and following assignments of error, amount to a deprivation of liberty without due process of law, and a denial of the equal protection of the laws.

I state this contention with diffidence; but it seems to me that upon sound principles of constitutional liberty, it is not due process of law for a State to permit the private books of its citizens to be seized under process which does not cover them and to be used as evidence to convict of a felony. Nay, more: it is not due process for a State to permit the inmost secrets and details of a man's conscience to be wrung from him by supplemental proceedings, to which he can not object, because the statute has provided [Code of North Carolina sec. 488 (4)] that his examination shall not be used against him in any criminal proceeding or prosecution; and then permit this information to be used to convict him of a crime under the thin disguise that after it was elicited in supplemental proceedings the prosecutor was smart enough to compel its repetition over an objection before a referee; and that only the latter was used. The protection of the statute is a hollow mockery if this can be done.

Counselman v. Hitchcock, 142 U. S., 547.
LaFontaine v. Underwriters, 83 N. C., 142.

This extorting of evidence by the process of the Courts is not and can not be due process. "Due process of law is process due according to the law of the land."

Walker v. Sauvinet, 92 U. S., 90.

No law can be due process which subjects the individual to the arbitrary exercise of the power of government unrestrained by the established principles of private right and distributive justice.

Leeper v. Texas, 139 U. S., 462.

"Due process of law, in each particular case, means such an exertion of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Cooley Con. Lim., 356.

That this is a proper construction, see remarks of Mr. Justice Harlan, in *Hurtado* v. *California*, 110 U. S., pp. 546, 548, 557.

POINT SEVEN.

But apart from the merits of the discussion, I submit that the questions involved are too important to be disposed of in this summary manner, before the record is printed, without oral argument, with but little time allowed and amid numerous other engagements, to prepare the case for its proper presentation. No man can say that a case presenting to the Court the construction of the first clauses of the Fourteenth Amendment, in the light of its history and the opinions of great judges and lawyers, is either frivolous or meant for delay. The plaintiffs in error invoke the protection of the Constitution for their dearest rights and privileges. It is too big a subject to be dismissed without full argument. I earnestly hope the Court will give the plaintiffs in error a chance to present it with care and deliberation.

I have printed this brief under the idea that, inasmuch

as the defendant in error has not thought proper to wait till the expiration of the time to print the record under Rule 10, sec. 9, it would have the record, or a sufficiency of it printed, to submit this motion. (*Carey* v. *Houston, etc., R. Co.*, 150 U. S., 170.) If this is not done, we respectfully insist that the motion should not be considered.

R. O. BURTON,
For Plaintiffs in Error.

Raleigh, N. C., March 1, 1900.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

For dissenting opinion
see 3 & S. C. Rep. 653

No. 189. IN THE

FILED
OCT 12 1900
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

Oct. of Original Term, 1900.

JOHN P. MALLETT and CHARLES B. MEHEGAN,
Plaintiffs in Error,
vs.
THE STATE OF NORTH CAROLINA,
Defendant in Error.

Filed Oct. 12, 1900. 189

Memorandum of Plaintiffs in Error in Opposition to Motion to Advance Cause.

The statement filed by the defendant in error is defective in that it fails to show the additional assignment of errors filed, page 6 *et seq.* of brief of plaintiffs in error on motion to dismiss or affirm. (See Rule 21; *School District* v. *Hall*, 106 U. S., 428.)

This motion is addressed to the sound discretion of the court. I was informed that the case would be regularly reached in January. So I saw no occasion for hurry in its preparation. Afterwards I had an attack of fever, from the effects of which I have not fully recovered. I hope, therefore, that the case will not be advanced; or, if advanced, that it will be set down for argument late in the year, that I may have time properly to prepare it.

The plaintiffs in error are not in jail; and the little time between this and January, in a case of this nature, can make but little difference to the State.

Respectfully submitted,

R. O. BURTON,
For Plaintiffs in Error.

Raleigh, N. C., Oct. 8, 1900.